A

CHUAH AH KEE & ORS

v.

KUMPULAN PERUNDING (1988) SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABU SAMAH NORDIN JCA
ALIZATUL KHAIR OSMAN JCA
[CIVIL APPEAL NO: T-02(IM)-12-10]

C

8 AUGUST 2012

COMPANY LAW: *Directors - Liability - Payment of fees due to respondent under letter of undertaking - Letter of undertaking signed by one of company's director - Whether directors of company as a whole agreed to provide undertaking - Undertaking written on company's letterhead - Whether undertaking bound directors*

D

This was an appeal by the appellants ('defendants') against the decision of the High Court in allowing the respondent's ('plaintiff') claim. In brief, the service of Akitek Indahreka (Malaysia) Sdn Bhd ('Akitek Indahreka') was engaged by Taman Seaview Sdn Bhd ('the company') in relation to a certain project handled by the said company. However, in 1988, Akitek Indahreka ceased practise and the plaintiff architect firm took over the management and control of the company's project. Sometime in February 1994, the company gave notice to the plaintiff of its intention to sell the project to one Gardenia Pearl Sdn Bhd. The plaintiff agreed to this and in consideration thereof, it was alleged, the defendants, who were directors of the company at the material time, had given a written undertaking ('letter of undertaking') on the company's letterhead to the plaintiff to pay the plaintiff's professional fees up to the date prior to the company signing the Sale and Purchase Agreement ('S&P') with Gardenia Pearl Sdn Bhd. In its claim for all outstanding professional fees, the plaintiff based its action on the said letter of undertaking arguing that liability was thereby imposed on the defendants. In the High Court, the learned judge found for the plaintiff and hence this appeal. The issue that arose for consideration was whether the letter of undertaking herein bound the defendants.

E

F

G

H

I

Held (allowing appeal; setting aside order of the High Court) Per Alizatul Khair Osman JCA delivering the judgment of the court:

(1) The learned judge fell into error in holding that the letter of undertaking bound the defendants. This is because, (i) the letter of undertaking was written on the company's letterhead; (ii) the letter of undertaking was signed by the third defendant on behalf of the company; and (iii) the letter of undertaking was not signed by all the directors, *ie*, the defendants in their capacity as such. (para 14)

(2) Even though the letter of undertaking states that all professional fees incurred up to date of the S&P shall be borne absolutely by the directors of the company, in the absence of any evidence to show that the defendants had agreed in their capacity as directors to provide such undertaking, the same could not legally bind them. Unlike a partnership where liability is joint and several, a director cannot purport to bind the other directors in the absence of express consent by the other directors. (para 15)

[The plaintiff's claim was dismissed with costs.]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu-perayu ('defendan-defendan') terhadap keputusan Mahkmah Tinggi membenarkan tuntutan responden ('plaintif'). Secara ringkas, perkhidmatan Akitek Indahreka (Malaysia) Sdn Bhd ('Akitek Indahreka') telah diupah oleh Taman Seaview Sdn Bhd ('syarikat itu') berkenaan suatu projek yang dikendalikan oleh syarikat itu. Walau bagaimanapun, pada tahun 1988, Akitek Indahreka telah berhenti mengamal dan syarikat arkitek plaintif pula telah mengambil alih pengurusan dan kawalan projek syarikat itu. Pada bulan Februari 1994, syarikat itu telah memberi notis kepada plaintif berkenaan niatnya untuk menjual projek tersebut kepada Gardenia Pearl Sdn Bhd. Plaintif telah bersetuju dan sebagai balasan, adalah didakwa bahawa defendan-defendan, yang merupakan pengarah-pengarah syarikat pada masa itu, telah memberi akujanji bertulis ('surat akujanji') kepada plaintif atas kepala surat syarikat itu untuk membayar yuran profesionalnya sehingga tarikh sebelum syarikat itu menandatangani Perjanjian Jual Beli ('PJB') dengan Gardenia Pearl Sdn Bhd. Dalam tuntutannya

untuk baki yuran profesional tertunggak, tindakan plaintif adalah berdasarkan surat akujanji tersebut di mana liabiliti dikatakan ditanggung oleh defendan-defendan. Di Mahkamah Tinggi, yang arif hakim membenarkan tuntutan plaintif dan oleh itu rayuan ini. Isu yang dibangkitkan untuk pertimbangan adalah sama ada surat akujanji itu mengikat defendan-defendan.

Diputuskan (membenarkan rayuan; mengenepikan perintah Mahkamah Tinggi)
Oleh Alizatul Khair Osman HMR menyampaikan penghakiman mahkamah:

(1) Yang arif hakim khilaf dalam memutuskan bahawa surat akujanji mengikat defendan-defendan. Ini adalah kerana, (i) surat akujanji ditulis atas kepala surat syarikat itu; (ii) surat akujanji ditandatangani oleh defendan ketiga bagi pihak syarikat itu; dan (iii) surat akujanji tidak ditandatangani oleh semua pengarah-pengarah, iaitu defendan-defendan di dalam kapasiti mereka seperti itu.

(2) Walau pun surat akujanji menyatakan bahawa semua yuran professional dikira sehingga tarikh PJB akan ditanggung keseluruhannya oleh pengarah-pengarah syarikat itu, dalam ketidakhadiran sebarang keterangan untuk menunjukkan bahawa defendan-defendan telah bersetuju dalam kapasiti mereka sebagai pengarah untuk memberi akujanji sebegitu, akujanji tersebut tidak boleh mengikat mereka di sisi undang-undang. Berbeza daripada perkongsian di mana liabiliti adalah bersama, seorang pengarah tidak boleh mengikat pengarah-pengarah lain dalam ketidakhadiran persetujuan ekspres dari pengarah-pengarah lain tersebut.

[Tuntutan plaintif ditolak dengan kos.]

For the appellants - Rajindar Singh Veriah (Rheena Kaur with him); M/s Rajindar Singh Veriah & Co
For the respondent - Moses Susayan; M/s Prasad Abraham & Assocs

[Appeal from High Court, Kuala Terengganu; Civil Suit No: 22-80-2002]

Reported by Kumitha Abd Majid

JUDGMENT

Alizatul Khair Osman JCA:

[1] The appellants (the defendants at the High Court) appealed against the decision of the High Court Kuala Terengganu which had allowed the claim of the respondent/plaintiff (plaintiff) after a full trial.

[2] The plaintiff's claim was for:

(i) the sum of RM80,000 as per the consent order dated 9 November 1993;

(ii) interest at the rate of 8% p.a. on the sum of RM80,000 (from the date of the consent order to full realisation);

(iii) the sum of RM244,814.86 as the sum awarded in the Final Award No. 2 dated 20 November 2001;

(iv) interest at the rate of 8% per annum on the sum of RM244,814.86 from the date of the Final Award No. 2 to full realisation; and

(v) costs.

[3] The background facts are briefly as follows.

[4] Taman Seaview Sdn Bhd (the company) had, sometime in 1988, engaged Akitek Indahreka (Malaysia) Sdn Bhd to tender their services in respect of a project known as "Cadangan 2 Blok Pangsapuri 8 Tingkat Termasuk Tingkat Bawah untuk letak kereta dan 2 Blok Pangsapuri 4 Tingkat Termasuk Tingkat Bawah untuk Tempat Letak kereta Di Atas Lot 1709, Mk. Chendering, Daerah Kuala Terengganu" (the project).

[5] In 1988, Akitek Indahreka (Malaysia) Sdn Bhd ceased practice as architects and the plaintiff took over the management and control of all works and projects under Akitek Indahreka (Malaysia) Sdn Bhd including the project.

[6] Akitek Indahreka (Malaysia) Sdn Bhd had, in 1985, sued the company for unpaid professional fees *vide* Kuala Terengganu High Court Suit No.104-1985. On 9 November 1993, both parties entered into a consent order whereby the company agreed to pay the plaintiff the sum of RM80,000 as full payment of the plaintiff's professional fees.

[7] A further sum of RM496,687.52 was claimed by the plaintiff against the company as professional fees pursuant to a Memorandum of Agreement drawn up in 1992 for services rendered in respect of the project. A dispute arose between the parties as to the plaintiff's claim of this sum and the dispute was referred to arbitration. On 20 November 2001, the arbitrator issued a Final Award No. 2 awarding a sum of RM244,814.86 to the plaintiff.

[8] Sometime in February 1994, the company gave notice to the plaintiff of its intention to sell the said Lot 1709 and the project situated on the said lot to Gardenia Pearl Sdn Bhd. The plaintiff agreed to this and in consideration thereof the defendants gave a written undertaking *vide* letter dated 21 February 1994 (letter of undertaking) on the company's letterhead to the plaintiff to pay the plaintiff's professional fees incurred up to the date prior to the company signing the Sale and Purchase Agreement with Gardenia Pearl Sdn Bhd.

[9] The plaintiff's action herein is based on the letter of undertaking which the plaintiff claimed imposes a liability on the defendants, who were the directors of the company at the time the letter of undertaking was written, to pay to the plaintiff all outstanding professional fees incurred up to the date of the Sale and Purchase Agreement with Gardenia Pearl, as quantified in the consent order and the Arbitrator's Award.

[10] The appeal before us revolves around the letter of undertaking, whether it binds the defendants as alleged by the plaintiff or whether it binds the company as contended by the defendants.

[11] The defendants denied giving the letter of undertaking to the plaintiff to pay the outstanding professional fees. The defendants contended, *inter alia*, as follows:

(a) the letter of undertaking was issued by the company to the plaintiff whereby the company agreed to pay the plaintiff's outstanding professional fees; and

(b) the plaintiff's cause of action is against the company and not against the defendants.

[12] For ease of reference the letter of undertaking is reproduced below in full:

Kumpulan Perunding (1988) Sdn Bhd
44, Tingkat 1, Jalan Sultan Ismail,
20200 Kuala Terengganu,
Terengganu

Dear Sir,

Re: Condominium Project On Land Held Under Title No: HS(D) 4432 PT 2136 P Mukim Chendering, Daerah Kuala Terengganu

Kindly be informed that we have decided to sell the above property with approved building plans to Gardenia Pearl Sdn Bhd with the arrangement that all professional fees incurred up-to-date prior to the signing of the sale and purchase Agreement between Taman Seaview Sdn Bhd and Gardenia Pearl Sdn Bhd shall be borne absolutely by the directors of Taman Seaview Sdn Bhd and there shall be no claim whatsoever against Gardenia Pearl Sdn Bhd.

Fees thereafter shall be borne by Gardenia Pearl Sdn Bhd.

If you consent with the above arrangement, kindly signify your acceptance below.

Thank you.

Your faithfully

... sgd ... ... sgd ...

Yap Fock On For Kumpulan Perunding
For Taman Seaview (1988) Sdn Bhd

[13] The learned High Court Judge found that the letter of undertaking was binding on the defendants and they were therefore liable to pay to the plaintiff all the outstanding professional fees as set out in the plaintiff's statement of claim. The learned judge in his judgment said:

Adalah teramat jelas bahawa berdasarkan surat akujanji tersebut bahawa segala bayaran yuran profesional Plaintif hendaklah sepenuhnya dibayar oleh Defendan-defendan sendiri dan bukan oleh TSSB. Saya mendapati bahawa Plaintif telah membuktikan bahawa pada setiap masa material, Defendan-defendan adalah pengarah-pengarah TSSB.

A **[14]** In our view the learned judge fell into error in holding that the letter of undertaking was binding on the defendants. We agree with the defendant's submission that the letter of undertaking did not bind the defendants for the reasons which we set out below:

B (a) the letter of undertaking was written on the letterhead of the company;

(b) the letter of undertaking was signed by one director, ie, the 3rd defendant, Yap Fock On, on behalf of the company.

C (c) the letter of undertaking was not signed by all the directors (ie, the defendants) in their capacity as such.

[15] Thus, in our view, even though the letter (of undertaking) states that "all professional fees incurred up-to-date prior to the D signing of the Sale and Purchase Agreement between Taman Seaview Sdn Bhd and Gardenia Pearl Sdn Bhd shall be borne absolutely by the directors of Taman Seaview Sdn Bhd ...", in the absence of any evidence to show that the defendants have agreed in their capacity as directors to provide such undertaking, the E letter of undertaking cannot legally bind the defendants. Unlike a partnership where liability is joint and several, a director cannot purport to bind the other directors in the absence of express consent by the other directors.

F **[16]** For the above reasons, we unanimously allow the appeal, set aside the order of the High Court and substitute it with an order that the plaintiff's claim be dismissed with costs of RM35,000 to the defendants here and below. We also ordered the deposit be refunded to the defendants.

G

H

I